

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

C.M., on her own behalf and on behalf of her
minor child, B.M.; L.G., on her own behalf and
on behalf of her minor child, B.G.; M.R., on her
own behalf and on behalf of her minor child,
J.R.; O.A., on her own behalf and on behalf of
her minor child, L.A.; and V.C., on her own
behalf and on behalf of her minor child, G.A.,

Plaintiffs,

v.

United States of America,

Defendant.

No. CV-19-05217-PHX-SRB

ORDER

A.P.F. on his own behalf and on behalf of his
minor child, O.B.; J.V.S. on his own behalf and
on behalf of his minor child, H.Y.; J.D.G. on his
own behalf and on behalf of his minor child,
M.G.; H.P.M. on his own behalf and on behalf of
his minor child, A.D.; M.C.L. on his own behalf
and on behalf of his minor child, A.J.; and R.Z.G.
on his own behalf and on behalf of his minor
child, B.P.,

Plaintiffs,

v.

United States of America,

Defendant.

No. CV-20-00065-PHX-SRB

ORDER

1 Pending before the Court are Plaintiffs' Motions for Leave to Conduct the
2 Deposition of Kirstjen Nielsen. The United States has responded in opposition and
3 Plaintiffs have filed Replies. The Court will deny the Motions.

4 These Federal Tort Claims Act ("FTCA") cases allege negligence by the
5 United States in connection with its Zero Tolerance Policy and resulting family
6 separations because the government is alleged to have had no system for tracking the
7 existence of parent-child relationships, to have provided limited or no
8 communications between parents and children while separated, to have had no plan to
9 reunite parents and children, and to have allowed some children to be abused while in
10 its custody. The Plaintiffs also assert claims for intentional infliction of emotional
11 distress based on allegations that federal officials, including then Secretary Nielsen,
12 engaged in extreme and outrageous conduct intending to cause emotional distress or
13 acted in reckless disregard that their conduct would result in emotional distress.
14 Plaintiffs also allege loss of consortium.

15 Plaintiffs argue that Secretary Nielsen's intention in signing the DHS Referral
16 Policy which put into effect a formal policy that caused the separation of thousands of
17 asylum-seeking families at the United States-Mexico border is highly relevant to their
18 claims. Plaintiffs also wish to explore with Secretary Nielsen her knowledge about
19 the government's inability to adequately house and care for the separated children, to
20 track the parent-child relationships, to enable communication between the parents and
21 children, and to reunite families once separated. Plaintiffs also wish to ask about
22 Secretary Nielsen's knowledge of the psychological harm and trauma the parents and
23 children would experience as a result of their forcible separation and any services the
24 government planned to provide to address this harm. Plaintiffs state that despite
25 extensive discovery efforts they can only obtain this highly relevant information from
26 Secretary Nielsen.

1 The United States asks the Court to deny Plaintiffs’ request to depose Secretary
 2 Nielsen arguing that the Supreme Court and the Ninth Circuit have both held that
 3 extraordinary circumstances must be shown before a Cabinet level official¹ is deposed
 4 and such circumstances cannot be shown by Plaintiffs in light of its extensive
 5 document production and the depositions of many high-ranking government officials.

6 The parties disagree about the standard the Court should apply in deciding
 7 whether Secretary Nielsen can be deposed. The United States argues that the test to be
 8 applied here is set out in the recent Ninth Circuit decision in *In re U.S. Dep’t of Educ.*,
 9 25 F.4th 692 (9th Cir. 2022). In that case the Court held:

10 that extraordinary circumstances sufficient to justify the
 11 taking of a cabinet secretary’s deposition exist when the
 12 party seeking the depositions can demonstrate: (1) a
 13 showing of agency bad faith; (2) the information sought
 14 from the secretary is essential to the case; and (3) the
 15 information sought from the secretary cannot be obtained
 16 in any other way.

17 *Id.* at 702. Plaintiffs argue that this test is inapplicable as the underlying case before
 18 the Ninth Circuit was an action under the Administrative Procedure Act (“APA”)
 19 challenging agency action. Plaintiffs assert the appropriate test is the “apex doctrine”
 20 under which the Court must assess “(1) whether [Secretary Nielsen] has unique first-
 21 hand, non-repetitive knowledge of the facts at issue in the case and (2) whether the
 22 party seeking the deposition has exhausted other less intrusive discovery methods”
 23 citing *Apple, Inc. v. Samsung Elecs. Co., Ltd*, 282 F.R.D. 259, 263 (N.D. Cal. 2012).

24 The United States Supreme Court’s 1941 decision in *United States v. Morgan*,
 25 313 U.S. 999 (1941) arose prior to the passage of the APA but involved court review
 26 of agency action where the lower court had authorized the taking of the deposition of
 27 the Secretary of Agriculture. The Secretary also testified at trial. He was questioned

28 ¹ That Secretary Nielsen no longer is a Cabinet member does not change the
 analysis. See, *In re U.S. Department of Education*, 25 F4d 692, 705 (9th Cir. 2022).

1 about the process by which he reached the conclusions in the challenged order. The
2 Supreme Court ruled that the Secretary should never have been examined by
3 deposition or in court because the order he issued was quasi-judicial in nature and was
4 akin to examining a judge about the reasons for a given decision. The Court found
5 that, just as a judge cannot be questioned, the integrity of the administrative process
6 must by equally respected.

7 Relying on *Morgan* as the “seminal authority” for depositions of cabinet
8 secretaries and other high-ranking government officials, the Court in *In re U.S. Dep’t.*
9 *of Educ.* highlighted the reasons for a strict standard for allowing depositions of
10 cabinet secretaries. The Court noted that cabinet secretaries should not be distracted
11 from their essential duties by allowing depositions not absolutely needed for a case.
12 Cabinet secretaries also face a greater amount of litigation than most other witnesses
13 due to the numbers of cases involving the agencies. The Court reasoned that the
14 executive branch’s execution of laws could be crippled if the secretaries were
15 unnecessarily burdened with compelled depositions.

16 While the Court agrees with Plaintiffs that the holdings in *Morgan* and *In re*
17 *U.S. Dep’t. of Educ.* are not strictly applicable here as neither case arose under the
18 FTCA but involved reviews of agency action, the policy reasons expressed by the
19 Court in *In re U.S. Dep’t of Educ.* for requiring a stringent test before allowing
20 depositions of cabinet secretaries applies with equal force to cases arising under the
21 FTCA. The Court finds that extraordinary circumstances must be shown and that
22 Secretary Nielsen may be deposed only if the information is both essential to the case
23 and unobtainable any other way.


24 Contrary to the Plaintiffs’ contentions, Secretary Nielson’s testimony while
25 relevant is not essential to the case. Plaintiffs have obtained both documentary and
26 testimonial evidence about the government’s intentions in adopting the Zero
27 Tolerance and family separation policies as well as evidence that the government was
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1 ill-prepared to manage and track the separated families, to allow communications, to
2 reunite the families, and to address the psychological harm suffered by Plaintiffs.

3 Following the guidance of *In re U.S. Dep't. of Educ.* the Court denies the
4 motions.

5 IT IS ORDERED denying Plaintiffs' Motions for Leave to Conduct the
6 Deposition of Kirstjen Nielsen. (CV19-05217- Doc. 302 and CV20-00065- Doc. 301)

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8 Dated this 30th day of November, 2022.

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12 Susan R. Bolton
13 United States District Judge
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